NO. 83-2063

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

DR. GERALDINE FENNELL,

on behalf of herself and all others similarly situated,

PETITIONER,

V.

WARNER LAMBERT COMPANY,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION

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Pro se

FOREWORD

Respondent's brief in opposition to my petition for writ of certiorari requires a reply. Respondent has written a statement of the case which is so completely biased that it is tantamount to argument and its argument disregards the legal issues I raise. In sum, its tendentious version of the case's history and evasive argument are tailored to obscuring rather than meeting my argument.

In this response, I shall address arguments first raised in respondent's brief and I shall indicate omissions in respondent's statement of the case that are material to the points of law on which I base my petition.

Respondent has provided the text of two of the relevant rules but, significantly, not of Rule 37, Federal Rules of Civil Procedure. Because of its importance to the issues, I include the relevant text of

Rule 37.

* * * * * * * * *

As respondent has pointed out, there are motions pending in the district court and the court of appeals, which seek to correct factual errors.

If this Court finds it cannot review this case on the present state of the record, I would ask that it retain jurisdiction pending resolution of the motions in the lower courts.

RULE 37(a), Motion for Order Compelling Discovery, reads in relevant part:

(2)... if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling ... inspection in accordance with the request ...

RULE 37(b), Failure to Comply with Order, reads in relevant part:

(2)...If a party ... fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule ... the court ... may make such orders in regard to the failure as are just, and among others the following: (A) An order that the matters regarding which the order was made ... shall be taken to be established for the purpose of the action in accordance with the claim of the

party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders ...;

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, ...

C O N T E N T S

TABLE OF AUTHORITIES

REPLY TO BRIEF IN OPPOSITION

I. RESPONDENT'S ARGUMENT (pp. 11-13)

A. Petitioner's Issues of Law

Under respondent's first point i.e., "No reason exists for granting the writ," I learn of two mistakes that I made in preparing my petition. Let me, then, first correct the mistakes.

1. Factual Issues. Among the issues of law that I stated as reasons for granting the writ of certiorari, I raised some issues of fact. Respondent points out (p. 11) that this Court "does 'not grant a certiorari to review evidence and discuss specific facts.' United States v. Johnston, 268, US 220, 227 (1925)." Accordingly, I withdraw my petition to have this Court review specific facts. Although respondent ignores them, the issues of law that my petition raises are significant, as I shall now explain.

2. Rule 17 Considerations. My second mistake was to have neglected to state my reasons for granting the writ in the context of Rule

17 "Considerations Governing Review on Certiorari." Respondent erroneously claims (p. 11) that this "case has no significance whatsoever to anyone other than the litigants." The present issue is not the significance of my underlying case against Warner Lambert. It is, rather, the illegal denial of a hearing on the merits of the underlying case. As in Societé (203, 212), the decisions of the lower courts raise important questions as to the proper application of the federal rules of civil procedure in light of constitutional doctrine underlying these rules. Accordingly, I shall now show the connection between the issues of law that I raise and the considerations that govern review on certiorari, as stated in Rule 17.

a. Conflict with This Court's Decisions. (Rule 17.1c). My case comes to this Court from the appeals court in a form that portrays me, personally, as preventing a "discovery process agreed upon in 1978" to pro-

ceed and as "not permitting her attorney to withdraw." I dispute both characterizations. However, even if these characterizations were true in my case, this Court should still reverse the appeals court decision, on grounds of conflict with this Court's previous decisions. Specifically, the lower courts granted/affirmed defendant's Rule 41(b) motion to dismiss:

- that made allegations of discovery lapses for which, according to this Court's opinion in Societé, the procedures of Rule 37 are appropriate,
- where the district court was cognizant of behavior of plaintiff's attorney that made it impossible, contrary to this Court's opinion in Link, that the plaintiff could be deemed to "have 'notice of all facts, notice of which can be charged upon the attorney'(Smith v. Ayer, 101 US 320,326)."

b. Supervision of Judicial Proceedings (Rule 17.1a). The lower courts have so far departed from the accepted and usual course of

judicial proceedings as to call for an exercise of this Court's power of supervision. In regard to the two key issues of the existence of a discovery agreement involving document production as its first step, and plaintiff's attorney's behavior, plaintiff and defendant assert different facts. Denying due process, the lower courts accepted defendant's version:

- Regarding discovery, the district court (and the appeals court) accepted the existence of a discovery agreement that is documented only in correspondence originating from defense counsel. Furthermore, by granting defendant's Rule 41(b) motion to dismiss, in which defendant made allegations of discovery lapses by plaintiff, in circumstances where defendant had not sought, much less obtained, an order to produce under Rule 37, the district court in effect granted a motion to compel without argument or examination and, further, assumed subsequent noncompliance with an order to produce.

- With regard to the attorney-client problem, plaintiff asked the guidance of the district court on how to handle the matter and asked repeatedly that a nonprejudicial forum be provided to examine it. Practically all of the communication that took place between plaintiff and her attorney in connection with his motions to withdraw is in the form of correspondence. It is available for examination at a hearing. Accordingly, it would be possible to review in detail the problem that plaintiff was confronting.

Although denying two motions to withdraw as counsel, the district court was not responsive to my requests for help in obtaining information from my attorney and made no reference to these matters in its ruling on the motion to dismiss.

Neither the district court nor the appeals court has suggested how I might more appropriately have handled the situation.

B. Discretion Abused.

With regard to the second point in res-

pondent's argument -- that the "decision below is clearly correct" respondent fails to confront the issues of law that I raise.Its claim that there was no abuse of discretion can acquire legitimacy through association with Chira, Theilmann, Lyell, and National Hockey only by innuendo (e.g., "disobeying (sic) court rules (sic) -- p. 12) and only on the assumption that the reader will fail to examine these other cases and compare their circumstances with my case.

Respondent's oblique evocations of Link (pp. 11, 12) fail to come to grips with Link's relevance to the present case. This Court should be aware that, contrary to respondent's implication (p. 12), I have not argued that some critical procedural lapse was my lawyer's fault and not mine. The record shows that no critical procedural lapse may be laid at plaintiff's door. Defendant is responsible for impeding the progress of discovery, in many ways, but most tellingly by failing to

use Rule 37 to move to compel production and thus lend credibility to its claimed need to obtain documents from plaintiff. Defendant scarcely needed instructions from plaintiff's counsel, much less from plaintiff, on the procedures available to it. Plainly in conflict with this Court's opinion in Societé, its claim (p. 13) that it waited for two years to hear from plaintiff is empty in light of its failure to move to compel even when the court invited motions to compel.

To the contrary, I argue:

a) that Link holds clients responsible for their attorneys' actions and deems clients informed of all facts chargeable to the attorney. The ability to maintain the assumption of shared information between attorney and client is a policy consideration of overriding importance. Yet, I found a system apparently unprepared to deal effectively with the critical breakdown that occurred here in the basis for responsible

litigation, and

b) that Link's allusion to plaintiff's possible remedy in a malpractice suit against the attorney, even if technically applicable in the present instance, is inappropriate in an action that addresses issues of human rights. Even a successful suit against an attorney cannot restore the career status and future prospects I had worked to achieve in the business world nor can it assert the right of a professionally qualified woman to contribute at the highest levels of corporate management.

Respondent has simply offered no material response to my argument that the district court illegally granted its Rule 41(b) motion to dismiss, i) based on alleged discovery lapses in the absence of a Rule 37 motion to compel production and ii) in circumstances where the court could not maintain the assumption of shared information between lawyer and client. Accordingly, far from there being no abuse

of discretion, as respondent claims, the decisions of the lower courts go beyond abuse of discretion in substantially violating the rules of procedure and the prior decisions of this Court.

II. RESPONDENT'S STATEMENT OF THE CASE (pp. 3-11).

In many places, respondent's statement of the case is significantly in error. For purposes of the present petition, I am being guided by the appeals court's emphasis on two issues. Accordingly, I shall restrict my comments to errors in respondent's statement relative to these two domains.

A. Discovery History -- The "1978 Agreement"

Omissions such as the following obscure the basis in discovery history for the first important issue of law on which I base this petition namely, that defendant erroneously used Rule 41(b) where, were its allegations correct, this Court in Societé has said the procedures of Rule 37 are proper:

Respondent's account of discovery history errs in omitting to state --

1. On page 3: that, in 1977, plaintiff had promptly filed a full response stating answers and objections to its production request,

2. On page 3: that, thereafter, it was up to defendant to move, under Rule 37, to compel production of any documents it needed if it was dissatisfied with plaintiff's response,

3. On page 4: that the discovery procedure that respondent claims opposing counsel agreed to in November, 1978, namely, a three-stage sequence starting with document production by plaintiff, exists only in correspondence originating from defense counsel,

4. On page 6: that "in accordance with the earlier agreement of counsel the road was now clear" for defendant to renotice plaintiff's deposition,

5. On page 7: that "subsequent to the No-

vember 1980 denial of counsel's motion to withdraw," by redundant discussion of document production in place of moving to compel, defendant thwarted its own discovery, even in the face of plaintiff's initiative in reminding it to renotice plaintiff's deposition; and that it thereby also thwarted plaintiff's discovery since plaintiff had agreed to permit defendant to take plaintiff's deposition before obtaining answers to plaintiff's interrogatories,

6. On page 9: that the statement "Fennell's attorney acknowledged the 1978 agreement respecting the sequence of discovery" is untrue with reference to a three-stage sequence that starts with document production by plaintiff. The letter dated January 19, 1981, written by Fennell's attorney (A131) to which respondent refers plainly acknowledged a two-stage agreement respecting the sequence of discovery, that starts with defendant's deposition of plaintiff.

7. On page 8: that during the status con-

ference of December 14, 1982, (as reported in the district court's ruling), plaintiff's request that "the court ... impose a final discovery schedule so the case could soon be ready for trial" was countered by a defendant who "strongly objected to this recommendation and renewed his request that the action be dismissed for failure to prosecute."

8. On page 8: that following the status conference, Warner Lambert could have a) responded positively to plaintiff's request for a conference to discuss their objections to my interrogatories, and/or b) moved to compel production of any documents they wanted, as the court invited. Rejecting both options, they moved to dismiss. When plaintiff's efforts to proceed with discovery were greeted by the motion to dismiss, only then did plaintiff go back on the agreement (to first permit defendant's deposition of plaintiff) and move to compel answers to plaintiff's interrogatories.

9. On page 10: that the finding of the district court to the effect that the "parties had an agreement, 'long ago embodied in a stipulation and reflected in correspondence that document production would precede other discovery'" is at variance with the record in that the stipulation refers only to the subject of defendant's response to plaintiff's interrogatories, and the only supporting correspondence originates from defense counsel.

10. On page 10, in the lengthy extract from the district court's ruling (second sentence): that the phrase "the Rule 16 order (sic)" is presumably a clerical error in that no order under Rule 16, or otherwise, was issued by the district court. The appropriate phrase i.e.,"Rule 16 notice (sic)," is to be found in the same extract (last sentence).

Omissions such as the above tend a) to deflect attention from defendant's role in obstructing the progress of discovery, b) to place on plaintiff sole responsibility for

the passage of time, to which respondent now so frequently alludes (e.g., pp. 1, 3, 6, 8, 9, 12, 13), and c) to obscure the basis in discovery history for one of the issues of law that petitioner brings to this Court's attention namely, that respondent failed to avail itself of Rule 37, using redundant discussion of plaintiff's supposed failure to respond to its production request to impede its own and plaintiff's discovery and, contrary to this Court's opinion in Societé, sought dismissal under Rule 41(b).

B. Plaintiff's Attorney-Client Relation

Assertions and omissions such as the following obscure the fact that the only action I could have taken, as a responsible litigant, was to seek clarification of my attorney's behavior, which to this day, I have failed to obtain notwithstanding repeated requests to the district and appeals courts.

1. On page 6: Respondent cannot know that

my counsel "had explained to her, on numerous occasions, why he no longer wished to represent"me.

2. On page 7: Respondent misrepresents my petition, by referencing its page 7 in support of the statement that "the District Court acquiesced" to my request that my attorney's motion to withdraw be denied. Citing code, rule, and cases, the judge denied the motion (ROA 29) "the movant having failed to demonstrate good cause" (Petition p. 7).

3. On page 7: Respondent omits the final sentences of my statement (Principal Brief p. 19). Following the sentence that "I felt that my actions from then on, under any of the three options, would not be the informed actions of a responsible person," I stated: "It would be unjust to deny me my day in court in circumstances where I could not responsibly have acted other than as I did and where I made good faith efforts to remedy the situation. The sparse docket entries following denial of my motion for partial summary judgment were due

to 'inability and not to willfulness, (or) bad faith' on my part. Societé, supra, 1096."

4. On page 8: Respondent omits all reference a) to the event that precipitated its letter of December 22, 1981, namely the briefing schedule on my attorney's second motion to withdraw as counsel; b) to my requests to the court to activate my attorney's dormant motion; and c) to the court's denying my attorney's second motion to withdraw as counsel.

5. On page 10: Defense counsel fail to mention that the ruling of the district court contains no reference to the problem for my litigation that my attorney's behavior caused notwithstanding the plain presence of the problem in at least six items in the record and, of course, its anomalous presence on half of the pages of respondent's brief on appeal, and in the de-

cision of the appeals court.

Assertions and omissions such as the above tend a) to create the impression that my reaction to my attorney's motions to withdraw was unreasonable; b) to obscure the fact that the judge, magistrate, my attorney himself (by failing to file a memorandum supporting his second motion to withdraw), considerations of code, rule, and case law, more than I, were decisive in preventing his withdrawal as counsel; c) to divert attention from the fact that I was denied the nonprejudicial forum that I requested to resolve the problem that my attorney's unexplained attempts to withdraw as counsel created for my litigation (Petition p. 9) and d) ignore totally the anomaly of the absence in the ruling of indication that the judge had considered that my attorney's actions undermined my status as responsible litigant, or my good faith efforts, well-documented in the record, to deal with the situation.

III CONCLUSION

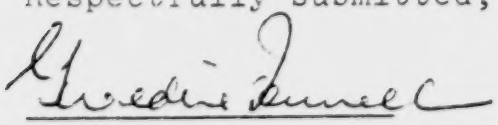
Based on the two issues of law on which I have focused in this paper, this Court should reverse the decision of the lower courts. In addition, other aspects of my argument include the following:

- The district court made no finding that defendant was prejudiced,
- The district court made no finding that supports the extreme sanction of dismissal,
- There was a mix of active and inactive prosecution,
- There was a period of sparse docket entries for which plaintiff offers a substantial explanation,
- Plaintiff's difficulties were known to the court during the period of sparse docket entries,
- Although plaintiff had requested it, the court issued no discovery schedule,
- No trial date had been set,
- In granting defendant's motion to dis-

miss for failure to prosecute, the court failed to consider the complete record and all the circumstances,

- The court was unable to consider all the circumstances in that the court's full understanding of plaintiff's difficulties would have required a hearing in which issues touching the merits might be raised,
- Although plaintiff asked for such a hearing, none was provided,
- There had been no trial of facts and the record contains mutually inconsistent affidavits,
- The court failed to note defendant's use of a "sleeping dogs" (Finley v. Parvin/ Dohrmann Co., 520 F 2d 386, 392 (2d Cir. 1975) strategy.

Respectfully submitted,



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Dated: 28 July 1984